No. 10058

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LILLIAN M. HOYT and EZRA S. HOYT, JR.,

Appellants,

vs.

SEARS, ROEBUCK AND CO., a corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

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ARGUMENT.

I.

The United States District Court Had No Jurisdiction of This Cause and the Doctrine of Waiver Is Not Applicable.

Appellants respectfully submit that the case of *Shamrock Oil and Gas Corp. v. Sheets,* 313 U. S. 100, 85 L. Ed. 1214, 61 Sup. Ct. 868, cited in appellants' opening brief, has definitely restricted the jurisdiction of the United States District Courts on removal of causes. In construing section 28 of the Judicial Code respecting the removal of actions and section 12 of the Judiciary Act of 1789 and section 3 of the Judiciary Act of 1875, it is

obvious that the United States Supreme Court has determined that a United States District Court has no jurisdiction over a cause which has been removed to it on the petition of the plaintiff in the state court action following the filing of a counter-claim or cross-complaint by the defendant in said action in the state court. This is true even though the requisite diversity of citizenship exists which would have enabled the plaintiff to have originally instituted the action in the United States District Court . (*Shamrock etc. v. Sheets, supra.*)

The purpose of section 3 of the Judiciary Act of 1875 and the acts of 1887 and 1888 was to circumscribe the jurisdiction of the United States District Court by limiting the right of removal to *non-resident defendants.*

The true theory behind the *Shamrock* case is that a litigant otherwise entitled to sue in the United States District Court, who has chosen the forum of the state in which to prosecute his action, is not thereafter entitled to remove the cause merely because the defendant in the state court has filed a cross-complaint. The *plaintiff* in the case at bar could have originally commenced its suit in the federal court because the necessary diversity of citizenship existed. The plaintiff however chose the forum of the State of California. Under such circumstances there can be no question of waiver on the part of the *defendant* by the mere failure to make a motion to remand the cause where the federal court, under the sections of the Judiciary Act cited in the *Shamrock* case, *supra,* had no jurisdiction to entertain the cause.

The case of *Mackay v. Uinta Development Co.,* 229 U. S. 173, 57 L. Ed. 1138, cited by appellee as determinative of the jurisdictional question involved herein, is

not in point for the reason that it involved a situation where the *non-resident defendant* filed the petition for removal coincident with *his* filing of an amended answer and cross-complaint within the jurisdictional amount of the United States District Court. Certainly such a case is different from the case at bar because the *appellant Mackay* was the person who had *instituted the removal proceedings* and who sought relief from the United States District Court. Obviously a person in his position could not thereafter attack the right of the United States District Court to hear the cause.

Appellants respectfully submit that the instant case is governed by the rule in the *Shamrock* case and that if any of the cases cited by appellee are in conflict therewith, it was the intention of the United States Supreme Court, when it decided the *Shamrock* case, to overrule any prior decisions which may have been inconsistent with the *Shamrock* case.

The United States Supreme Court in the *Shamrock* case cited with approval the case of *West v. Aurora*, 6 Wall. (U. S.) 139, 18 L. Ed. 819, where it is said:

> " 'The question here is not of waiver but of the acquisition of a right which can only be conferred by an act of Congress.' "

And as the Supreme Court says in the *Shamrock* case (313 U. S. 108):

> "Not only does the language of the act of 1887 evidence the congressional purpose to restrict the jurisdiction of the federal courts on removal *but the policy of the successive acts of Congress regulating the jurisdiction of federal courts in one calling for the strict construction of such legislation.*"

Thus we see that there is no logical ground for contending that the jurisdiction of the federal court in cases of this character must rest upon the mere failure of a defendant to move to remand the cause.

II.

There Is No Substantial Evidence to Support the Findings of Fact, Conclusions of Law or Judgment of the Trial Court.

The appellee refers the Court to Rule 52, Federal Rules of Civil Procedure (28 U. S. C. A. 723c) which provides as follows:

> "Findings of fact shall not be set aside unless clearly erroneous *and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*" (Italics ours.)

It is particularly significant to note in this case that the only persons who testified before the trial court were the two medical witnesses, Drs. Dickerson and Horst, Gladys Stewart, Ezra Hoyt, Robert C. Danielson and Lillian M. Hoyt.

The three eye witnesses to the accident, Florence Hastings, Francis H. Hoffman and Lenton W. Finton, did not testify before the trial judge. Their testimony as given before a Coroner's Jury *was read into evidence* at the trial from a reporter's transcript of the proceedings at the Inquest. The trial court therefore had no more opportunity to judge the credibility of these witnesses than has this Honorable Court.

So far as the witnesses who did testify at the trial are concerned, their testimony, other than that of Officer Dan-

ielson does not bear upon the manner in which the accident occured. *Officer Danielson did not arrive at the scene of the accident until after it had occurred. He was not an eye witness.* While much of his testimony consists of his conclusions with reference to the supposed point of impact and the effect or character of various marks which were located upon the surface of the highway, his testimony, in the opinion of appellants, does not aid the appellee as will be pointed out later.

On page 22 of the reply brief, appellee summarizes the evidence which it claims supports the findings of fact, conclusions of law and judgment, in part as follows:

> "(1) The deceased and the defendant Lillian M. Hoyt were approaching each other from opposite directions and were involved in *virtually* a head-on collision." (Italics ours.)

There was no evidence presented to the trial court which would justify a conclusion that there was any head-on collision in this case. While it is true that the cars were traveling in generally easterly and westerly directions, it is apparent from all of the evidence that just prior to the impact *neither automobile* was traveling in an easterly or westerly direction. The appellee's entire reply is based upon a recitation of certain physical facts but there is one physical fact that stands out more prominently than any other in the record and one which the appellee has not explained and cannot explain to this Honorable Court.

Officer Danielson, upon whose testimony appellee so strongly relies, testified as follows:

> "Q. * * * Did you notice what the damage was to the Mercury? A. The whole front end was

smashed in; the motor was knocked back; in fact, it was folded up pretty bad, the front end; it seemed like it just came together like an accordion.

Q. Did you notice what the damage was to the Packard? A. *The Packard was almost a total wreck. It started from the right front on back to the right rear.*

Q. *Along the right side?* A. *Along the right side.*

Q. Did you notice which way, in general, the metal parts on the right side of that Packard were pushed? A. *It was definitely hit from the right front fender,* and pushed on back. * * * [Tr. p. 79, fol. 23.]

A. The vehicle seemed to have been struck from the right front toward the right rear.

Q. By Mr. Stanbury: That is, the metal parts on the right side seemed to be bent backward? A. Yes, sir.

Q. *Was there any damage to the left side of that Packard, that you could see?* A. There wasn't. * * * [Tr. p. 80, fol. 24.]

Q. Is any part of the front of the Packard damaged, that you can see? A. *No part of the extreme front; just back of the right front fender.*

Q. *It starts on the side of the right front fender?* A. *Yes."* [Tr. p. 80, fol. 24.]

With the foregoing testimony in mind, it is impossible for appellants to ascertain how the appellee can state to this Honorable Court that these two vehicles were involved in a *head-on collision.* It is true that the appellee qualifies this somewhat by stating that it was *virtually* a head-on collision, but the effect that is sought to be left in the mind

of the Court is that it was a head-on collision. Actually it was nothing of the kind as will be seen from the foregoing testimony of the police officer.

Appellants rely not only on the testimony of the three eye-witnesses in this case, who, without exception, as has already been pointed out in great detail in the appellants' opening brief, placed the point of impact on the defendant's side of the highway, but *also upon the so-called physical facts which are deemed so important by appellee.*

Appellants would like to have appellee answer one question. *If the defendant was traveling in an easterly direction on the extreme right hand side of the highway and suddenly swerved to the middle of the highway, leaving only 48 feet of skid marks from the point where she commenced to swerve her car up to the point of impact, how could the Packard automobile driven by decedent Hutchinson, traveling in a westerly direction, at all times on its own side of the highway as claimed by appellee, sustain all of its damage on the right side thereof commencing at a point back of the right front fender, with no damage to the front end of the Packard and no damage on the left side of the Packard?*

No logical answer can be found to this question which would support the appellee's theory of this case. Not only would the non-legal mind find it impossible to conclude that the decedent was in fact traveling in the manner in which the appellee would have this Court believe, but certainly the legal mind would have no difficulty in determining that it would be a *physical impossibility* for the defendant's car to have collided with the right side of the Packard automobile if the Packard automobile was at all times traveling in a westerly direction and on its own

right hand side of the center of the highway. The testimony of the police officer with reference to the skid marks and the damage to the respective vehicles proves *conclusively* that at the time of the impact the Packard automobile *must have been pointed almost due south,* otherwise the Packard would have been damaged on the front end and the left side.

Further summarizing the evidence, appellee contends on page 23 of its brief that there is not the slightest evidence of the collision having occurred on the defendant's own side of the highway.

It is difficult for appellants to understand how the appellee could in good faith make such a statement in view of the record as follows:

The testimony of Lenton W. Finton reveals that:

> "Q. Then which car was on the wrong side of the highway, that is on the wrong side of the center line? A. *The Packard;* when they got stopped, the Mercury was setting on that white line, or practically over it, but as near as I could tell from watching, she did not go across that double white line." [Tr. p. 104, fol. 50.]

In the face of such testimony from *eye witnesses* it is easy to understand why appellee *must resort* to so called "physical facts."

Appellee attempts to discredit the testimony of this witness by asserting that "this witness never saw the decedent's car at all." (Rep. Br. p. 30.)

While there was no minute cross-examination of this witness at the coroner's inquest which might have brought out more detail, the witness did testify that he saw the

Packard *at the time of the impact*. The witness was asked the following question:

> "Q. Did you see the Packard *before* the impact? A. No, sir, the first I seen it was *when she hit him.*" [Tr. p. 104, fol. 50.]

It is apparent from the testimony of the witness Finton that he saw the Packard and the Mercury at the *moment of impact* and that *at that time* the Mercury was on its right side of the highway, that is, south of the center line. The fact that the defendant's car eventually wound up to the north of the double white line has no probative value whatsoever in determining the location of the point of impact. Significantly enough, the appellee read into evidence the testimony of the witness Lenton W. Finton.

The appellee likewise attacks the credibility of the witness Florence Hastings. As has already been pointed out in the appellants' opening brief, the witness Florence Hastings testified that at the time of the impact the Packard was upon the wrong side of the road. [Tr. p. 114, fol. 60.]

The appellee attacks the credibility of this witness by reason of the fact that she was two-tenth's of a mile behind the car driven by the decedent. It is interesting to note that the testimony of the witness Lenton W. Finton which was introduced in evidence at the trial by appellee and the testimony of the witness Florence Hastings, introduced in evidence at the trial by appellants, was in both instances read to the Honorable Trial Judge from a transcript thereof taken at the coroner's inquest. [Tr. pp. 102 and 113.] Therefore, this Court is in just as good a position to judge the credibility of these witnesses as was the trial judge.

In view of the foregoing testimony, appellants are at a loss to understand how the appellee can assert to this Honorable Court that there was not the *slightest evidence of the collision having occurred on the defendant's side of the highway.*

Appellee refers to the fact that there were 48 feet of skid marks leading from the extreme right hand edge of the defendant's side of the road and that "these marks were as straight as if laid out by surveyors' instruments." (Rep. Br. p. 23.)

There is no testimony in the record which would support this statement that the skid marks left by the defendant's automobile were as straight as if laid out by surveyors' instruments. Officer Danielson was asked the following question:

> "Q. Will you draw in the 48 feet, skid marks from the Mercury, and you may measure that off with this scale? A. *They go in a slight curve.*" [Tr. p. 77, fol. 21.]

The appellee seeks to have this Court believe that this accident is an unexplained accident; that the defendant suddenly swerved her automobile from her own right hand edge of the highway over onto the left side thereof "and collided with another car *which was in its proper position on its own side of the road.*" (Rep. Br. p. 26.) The physical facts demonstrate that decedent's car could not possibly have been in its *proper position on its own side of the road.*

Appellee attempts to attack the character of the defendant Lillian M. Hoyt by suggesting to this Honorable Court that the

> "liquor which she had been drinking had so affected her as to cause her to lose control of the car. The fact that she was traveling away from her home, rather than toward it, at a time when she should have been going toward it, and without any explanation from anyone as to why she was going in the opposite direction, might lead to the assumption that perhaps she was not at all in possession of her proper faculties at the time of the accident." (Rep. Br. pp. 20-21.)

The only testimony concerning any liquor consumed by the defendant was given by the witness Gladys Stewart who testified that prior to 2 o'clock, the defendant had two bottle of beer, one with her lunch and one after lunch. [Tr. pp. 140-141.]

The testimony of plaintiff's witness Dr. W. W. Horst was to the effect that the defendant had an alcoholic breath. [Tr. p. 61.]

There is nothing in the record which supports an inference that the defendant was intoxicated or was under the influence of intoxicating liquor.

Throughout its brief, appellee stresses the testimony of Officer Danielson that the driver of the Mercury left 48 feet of skid marks upon the surface of the highway. Appellants feel that this testimony, viewed with the testimony of the eye-witnesses and the testimony of Officer Danielson respecting the damage resulting to the Packard automobile, offers the most logical explanation for the accident. Appellee would have this Court believe that the actions of the defendant Lillian M. Hoyt in driving her automobile im-

mediately prior to the impact cannot be logically explained and that her automobile took the path it did solely by reason of the inability of the defendant to control the same by reason of the fact that she had consumed two bottles of beer. They are trying to obscure the facts from this Court as they successfully did before the trial court.

Appellants would like to ask appellee and this Court another question which they feel must be answered before this case can be disposed of. The evidence is undisputed that the appellant was driving her automobile in a normal manner on the extreme right hand edge of the pavement in front of the car driven by the witness Francis H. Hoffman and in which car the witness Lenton W. Finton was a passenger. There was no testimony which would indicate that the Mercury was being driven at an excessive or unlawful rate of speed or in an erratic manner. The only testimony with reference to the speed of the Mercury was given by the witnesses Finton and Hoffman, both of whom testified that the Mercury was traveling approximately 40 miles per hour. [Tr. pp. 106, 109.] No witness knew what caused the Mercury to swerve but the testimony is undisputed that the defendant's car suddenly swerved from the extreme right hand edge of the pavement toward the center of the highway, *leaving 48 feet of skid marks*. Appellee suggests that a driver of an automobile who is under the influence of intoxicating liquor might suddenly, for no reason at all, swerve from the side of the highway toward the center thereof. There is no question but that a person who is under the influence of intoxicating

liquor might suddenly swerve toward the center of the highway, for no apparent reason, but would such a person apply his brakes so that they would leave solid skid marks for a distance of 48 feet up to the point of impact? Appellants submit that the defendant Lillian M. Hoyt swerved her car to the left and applied her brakes as hard as she could because the decedent Hutchinson was coming off the curve which was immediately to the east of the point of impact, heading directly toward the defendant and causing her to believe that he would proceed directly into her path. The application of brakes indicates an *attempt* to *control* and not a sudden erratic *uncontrollable* act.

Did the decedent leave any skid marks? The answer is no, despite the fact that if the accident happened as appellee states, the defendant's car must have been obviously turning toward the center for 48 feet! All the decedent left were brush marks. The police officer testified that the decedent's automobile left 15 feet of brush marks. [Tr. p. 88.] This Court can take judicial knowledge of the fact that brush marks are caused, not by the application of brakes, but by the turning of an automobile while traveling at a high rate of speed. Officer Danielson testified:

> "Q. That is to say, whatever marks may appear upon this variety of photographs, taken after the cars were removed, none of them are to be taken as indicating that the brakes on this Packard had been applied before the impact? A. That is what I would say.
>
> Q. You saw no such marks? A. I saw no such marks." [Tr. pp. 89-90.]